Supreme Court, U.S.
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No. 99-1855

In The

Supreme Court of the United States

WILLIAM H. VIEHWEG,

Petitioner,

v.

SUSAN H. MELLO,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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Respondent Pro Per

21pp

QUESTION PRESENTED

The question before the Court is whether the Eighth Circuit Court of Appeals violated petitioner's Constitution of the United States First Amendment right to free speech and public access to judicial documents, and compromised the public's confidence in the judiciary, when the court (after receipt of Mr. Viehweg's written opposition) granted Respondent Mello's motion to seal the file, ordering the court file permanently sealed and requiring all persons, including Petitioner Viehweg, to show good cause for access to the file.

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STATEMENT OF THE CASE

In February, 1997, William Viehweg initiated his pro se, diversity claim against Susan H. Mello, a Missouri attorney, in the United States Eastern District Court of Missouri. His suit arose out of the fact Ms. Mello wrote him she did not agree with him and would not file a lawsuit on behalf of Mr. Viehweg that she believed would violate Fed. R. Civ. P. 11. One of her reasons for believing such a violation would result from filing Mr. Viehweg's lawsuit was his stated intention to file such suits to do a book on them. *See Viehweg v. Mello*, 5 F.Supp. 2d 752 (E.D. Mo. 1998).

The district court determined that Mr. Viehweg's claim was without merit and Ms. Mello's conduct was in compliance with Fed. R. Civ. P. 11. *Viehweg v. Mello, supra.* The court granted summary judgment in favor of Ms. Mello on all counts and, pursuant to a written motion, ordered the deposition of Ms. Mello sealed. *Viehweg v. Mello, supra.* The court had earlier entered orders which limited Mr. Viehweg's direct communications with Ms. Mello.

Mr. Viehweg appealed the court's summary judgment ruling and, in a per curiam, unpublished opinion, the Eighth Circuit Court of Appeals upheld the district court's ruling. (Petition at A4). His Petition for a Writ of Certiorari was denied on May 30, 2000.

During these proceedings, Mr. Viehweg also contended that Ms. Mello could not participate in the case and questioned the form of her entry. Mr. Viehweg's motions to disqualify Ms. Mello or strike her entry in the district court and the Eighth Circuit were denied. His

March, 2000 Petition for Writ of Certiorari, Docket No. 99-1572, and his September, 1998 Petition, Docket No. 98-467, both of which addressed this issue, were also denied.

Although Mr. Viehweg had turned to the state courts in 1999, seeking an injunction from the St. Louis County Circuit Court concerning Ms. Mello's form of entry in the federal action, his appeal and his motions there were denied, as was his March, 2000 Petition for Writ of Certiorari, Docket No. 99-1572, terminating that underlying litigation.

Having been rebuffed by the courts, Mr. Viehweg then resorted to a series of increasingly threatening communications, including letters and calls, all after the prior orders, and after he had been told not to contact Ms. Mello directly. In these letters he described a planned personal attack on Ms. Mello by using the information from the court files and motions to try to hold her up to ridicule. (Brief in Opp. at App. 1-6). In one part Mr. Viehweg stated:

> I think it only appropriate that I inform you, first, of the new status of this matter.
>
> . . .
>
> The question is just how many of the thousands of Missouri attorneys will be willing to support you in public. The only way to answer that question is to put the matter before them.
>
> . . .
>
> Second, the public is currently unaware of these matters. If they were aware, would they support

> you, or be outraged? The only way to answer that question is to put the matter before them.
>
> . . .
>
> So I am about to begin a campaign to inform the legal profession, the public, and the congress, of the current status of the laws . . . Are you, and your level of competency, the new poster child for the legal profession? Are you the best the public can expect?
>
> . . .
>
> If you wonder why I am doing this, consider, that I represent the ninety-nine percent of the population that are not attorneys, and we both need and deserve better from the profession, and the courts. I believe, that once informed, we will demand it. I fail to believe that the legal profession will publicly support you and your kind. I fail to believe that the other forty-nine states will publicly support Missouri, if Missouri continues to allow you and your kind to act as you are.
>
> Until then, let the new attorney jokes deservingly fly. For instance, what is a court jester? An attorney. What is the first state to license foolery? Missouri. Who is the first attorney to publicly admit she is a licensed fool? Susan H. Mello.
>
> "The Mello Factor".

(Brief in Opp. at App. 3-6).

When Ms. Mello rightfully ignored his January 10, 2000 letter, he escalated and, on January 18, 2000, Mr. Viehweg sent a copy of that letter to twenty individuals,

most of whom have long since ended any involvement in the case. (Brief in Opp. at App. 1-6).

Ms. Mello filed a written Motion to Seal the court's file, attaching the letters, with the U.S. Eastern District Court and the Eighth Circuit. The court gave Mr. Viehweg a chance to be heard. Although he submitted a written motion in opposition, he did not ask for a hearing. The Eighth Circuit granted Ms. Mello's Motion to Seal the court's file on February 17, 2000. (Petition at A1). The U.S. Eastern District Court then effectively found the issue before it was moot wherein its files were covered by the Eighth Circuit Order. (Petition at A5-A6).

REASONS FOR DENYING CERTIORARI

Mr. Viehweg's Petition for Writ of Certiorari should be denied. The issue presented in Mr. Viehweg's Petition, whether the sealing of the Eighth Circuit's and U.S. Eastern District's court files violated his First Amendment rights, does not present any error or involve a conflict between prior Eighth Circuit rulings.

The issue presented by Mr. Viehweg does not involve any conflict between the appellate circuit courts or involve a ruling by the lower courts that, "has so far departed from the accepted and usual course of judicial proceedings . . . as to call for an exercise of this Court's supervisory power . . . " Supreme Court Rule 10(a).

Instead (as admitted by Mr. Viehweg in his Petition), such orders are left to the court's discretion where "the right to inspect and copy judicial records is not absolute."

Nixon v. Warner Communications, Inc., 435 U.S. 589, 598 (1978); *See also* Petition at 5. This Court in *Nixon* went on to hold:

> Every court has supervisory power over its own records and files, and access has been denied where court files might have become a vehicle for improper purposes. For example, the common-law right of inspection has bowed before the power of a court to insure that its records are not "used to gratify private spite or promote public scandal." *In re Caswell*, 18 R.I. 835, 836, 29 A. 259 (1893). Accord, e.g., *C. v. C.*, 320 A. 2d 717, 723, 727 (Del. 1974). *See also King v. King*, 25 Wyo. 275, 168 P. 730 (1917). Similarly, courts have refused to permit their files to serve as reservoirs of libelous statements for press consumption, *Park v. Detroit Free Press Co.*, 72 Mich. 560, 568, 40 N.W. 731, 734-735 (1888); *see Crowley v. Pulsifer*, 137 Mass. 392, 395 (1884) (per Holmes, J.); *Munzer v. Blaisdell*, 268 App. Div. 9, 11, 48 N.Y.S.2d 355, 356 (1944); *see also Sanford v. Boston Herald-Traveler Corp.*, 318 Mass. 156, 158, 61 N.E. 2d 5, 6 (1945), or as sources of business information that might harm a litigant's competitive standing, *see*, e.g., *Schmedding v. May*, 85 Mich. 1, 5-6, 48 N.W. 201, 202 (1891); *Flexmir, Inc. v. Herman*, 40 A.2d 799, 800 (N.J. Ch. 1945).

Nixon v. Warner Communications, Inc., 435 U.S. at 598 (1978).

Mr. Viehweg has not shown or claimed any actual harm. He has not shown or claimed any good faith use for the material contained in the court files to which he was denied access. Instead, the court is well within its

rights to limit access where Mr. Viehweg's letters document a planned, bad faith intention. Even more so, now, there can be no harm where the underlying litigation is over, his appeals are exhausted, and for any good faith use he need simply to submit a motion to the court.

The authority for the court is reflected in the federal rules which expressly grant the courts the authority to seal discovery documents. Fed. R. Civ. P. 26(c), provides:

> the court . . . may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden . . .

A court also has inherent authority and broad discretion to control its proceedings and the use of any information relating thereto in order to protect litigants. Under its ancillary jurisdiction, it has continuing authority, even in closed cases, over its files and use of its information. There is also substantive authority in Missouri law to protect parties from disclosure and publication. *Hunter v. International Systems & Controls Corp.*, 51 F.R.D. 251 (W.D. Mo. 1970). Under Missouri law, a party has a substantive right to be protected from public disclosure and use of information "for undesirable publicity purposes." *State ex. rel. Kubatzky v. Holt*, 483 S.W.2d 799 (Mo. Ct. App. 1972).

Here, such a remedy was needed. Ms. Mello is a practicing attorney. She was falsely accused by Mr. Viehweg all because she complied with her ethical duties and Fed. R. Civ. P. 11 in refusing to file a lawsuit which she believed did not meet Fed. R. Civ. P. 11 standards and

which she believed he wanted to file for improper reasons. Mr. Viehweg now seeks to use his meritless pro se suit to misuse information on her clients and practice.

As his 1999 and 2000 letters show, he not only threatened, but put into effect a personal attack on her out of some kind of continuing obsession with Ms. Mello, where after three years of his pro se litigation he cannot let go. Instead, out of malice, he is threatening to make her what he called a "poster child" for jokes and ridicule using information from court arguments and court files. (Brief in Opp. at App. 1-6). His threats are not ones that can be ignored. Instead, as even reflected in the reported cases and findings by other judges, Mr. Viehweg has a history and track record that demonstrates a pattern of malice and misuse of the courts.

This is shown in *Viehweg v. Taylor*, 797 F.Supp. 751 (E.D. Mo. 1992), where after his claim in *Viehweg v. P. & R. Investments*, 733 S.W.2d 213 (Mo. Ct. App. 1987), was found to be meritless, Mr. Viehweg personally pursued Morris Taylor, the attorney for P. & R. Investments, until that attorney had to seek a personal protective order to keep Mr. Viehweg from stalking him.

In *Viehweg v. Devereux*, No. 90-2322-C(7) (E.D. Mo. 1991), Mr. Viehweg then pursued Joe Devereux, Jr., a court appointed attorney, after Devereux withdrew from representing Mr. Viehweg. When Mr. Viehweg's claim was dismissed, as barred by the statute of limitations, Mr. Viehweg not only appealed to the Eighth Circuit (No. 91-1798), but then petitioned the U.S. Supreme Court (Docket No. 91-1220), contending the statute of limitations should not apply because it was a pro se action.

This is even more so in *Re/Max v. Viehweg*, 619 F. Supp. 621 (E.D. Mo. 1985) where Mr. Viehweg retaliated against Re/Max, his former employer. There, after Re/Max refused to capitulate to what can best be described as extortion (with Mr. Viehweg threatening to report them if they did not pay him $97,000.00 and give him a job in Florida) Judge Hungate found:

> 10. On Saturday, April 7, 1984, defendant [Mr. Viehweg] entered plaintiff's St. Louis offices and searched the desks, closets, and credenzas in the office, including the desk belonging to Beherns [Mr. Viehweg's supervisor]. Defendant removed and read various documents and then took numerous documents, papers, and records home with him.
>
> . . .
>
> 15. In late April of 1984, defendant [Mr. Viehweg] contacted Gordon Gundaker, a St. Louis area realtor and Re/Max competitor, and offered to sell Gundaker information which would help him to keep Re/Max or its franchisees from hiring away his real estate agents.
>
> 16. In October of 1984 defendant [Mr. Viehweg] sent mailings to thirty prominent St. Louis area realtors and Re/Max competitors to solicit their hiring of him as a consultant who would show them how to keep Re/Max or its franchisees from hiring away their real estate agents.
>
> 17. As a result of defendant's [Mr. Viehweg's] October 1984 mailing, defendant met with representatives of Gundaker Realty, Ira E. Berry Realty, and Century 21 Realty, wherein defendant [Mr. Viehweg] offered to sell to each of

> those real estate companies information designed to help them keep Re/Max or its franchisees from hiring away their real estate agents.
>
> 18. In a series of telephone conversations . . . on December 11, 14, and 18, 1984 defendant [Mr. Viehweg] threatened to take his allegations of Re/Max's wrongful misconduct to the Federal Trade Commission and the Illinois Attorney General unless Re/Max paid him $15,000.00 in a lump sum, plus $3,000.00 per month for twenty-four months, and assigned him plaintiff's [Re/Max's] Florida Region.
>
> 19. On February 4, 1985, defendant [Mr. Viehweg] sent a mailing to over 500 offices of Re/Max subfranchisors and franchisees in which he accused Re/Max of improper registration of its franchise salespersons, of unsound financial conditions, and of making fraudulent statistical disclosure and false earning claim.

Id. at 624-25.

As Judge Hungate found, Mr. Viehweg "did not rebut plaintiff's evidence and continued to insist that his actions were proper." *Id.* at 625. Although Re/Max was awarded a judgment of $85,000.00, it was never paid.

Here, as his own letters document his planned misuse of the court file is to humiliate and ridicule Ms. Mello to ruin her career, threatening to take away her livelihood and cause her irreparable harm, hoping to drag her into a new pro se lawsuit on his new actions.

Faced with such actions and circumstances, the Eighth Circuit rightly entered their Order sealing the file. (Petition at A1).

While his Petition alleges that he was "denied access to the federal court files", (Petition at 4), and "does not have immediate access to the file" (Petition at 7), Mr. Viehweg has not contended he made any motion or request to view the court file. Mr. Viehweg has the same opportunity to obtain copies as Ms. Mello, by a simple motion to use file material for appellate court filings.

Mr. Viehweg has not pointed to any item he did not have. His own Writ shows that he freely attached and relied on service copies.

What Mr. Viehweg is instead seeking, as in his notebook, is to have this Court allow him to profit from his bad faith filing of the lawsuit to obtain and then use the information for more bad faith purposes.

The Eighth Circuit's decision was well within its discretion to seal its file. There is no deprivation of any Constitutional or other rights. It is well within their rules and duty owed to see that the courts are not misused. This is especially so where this litigation itself arose out of Ms. Mello's mandated compliance under Fed. R. Civ. P. 11.

CONCLUSION

For the reasons set forth above, the Eighth Circuit's decision to seal the court file was proper and Mr. Viehweg's Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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January 18, 2000

Enclosed you will find a copy of a letter I recently faxed to Susan H. Mello. The letter is self-explanatory. You have been provided a copy, as a courtesy, as you are listed below as among those who have supported Ms. Mello in her contention that she can act as legal counsel for herself.

Please do not respond to me unless 1) you are incorrectly included in the list; 2) you no longer support Mello's contention; 3) you wish to provide additional legal argument in support of Mello's contention, and 4) you do so

via written letter. Future courtesy notices from me will be addressed only to Susan H. Mello.

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Sincerely,

/s/ William H. Viehweg
William H. Viehweg

William H. Viehweg
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January 10, 2000

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Susan H. Mello
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RE: Viehweg v Mello

Ms. Mello,

I think it only appropriate that I inform you, first, of the new status of this matter. You have insisted on representing yourself as legal counsel for yourself. Multiple attorneys have argued in multiple courts that you have that legal right, and multiple judges have recognized you in that status, yet neither cite law and no opinions have been rendered that become law.

I firmly disagree that you have the legal right to such status. Further, I fail to believe that either you or your other attorneys believe that you do. I also fail to believe that the judges believe that you have that legal right. So the question becomes, why have you been allowed to represent yourself as legal counsel?

There are two possible answers. First, that by some quirk in the current law, you can. Second, that by the current law, you can't. So, I am proceeding in such manner that it won't really matter which possibility is correct.

First, though you have had several tag-team attorneys arguing in your support in court, the question is just how

many of the thousands of Missouri attorneys will be willing to support you, in public. The only way to answer that question is to put the matter before them. Major legal questions will have to be addressed, such as:

> Do you have an attorney/client, principle/agent, contractual relationship with yourself, and does Missouri recognize such relationships within a single person, and if so, why?
>
> Is self-representation by a natural person the practice of law, or not, and if so, then is my self-representation the illegal, or legal, practice of law?
>
> Though we have only dealt with civil cases, must we not conclude that if you were a defendant party in a criminal case, your self-representation would also be as legal counsel for yourself? Why would Missouri allow that?
>
> If the act of self-representation by an attorney is the practice of law, then an attorney can only represent herself as legal counsel, as she is precluded, by definition, from acting pro se. Is that constitutional?
>
> What is the legal definition of pro per, and what is the source of the definition?
>
> If attorneys can represent themselves as legal counsel in legal malpractice cases, won't their malpractice insurance be "forced" to pay the defendant attorney's self-generated legal bills? Is it constitutional for an insured to "profit" from her own malpractice?
>
> What value does the public derive from attorneys being able to represent themselves as their own legal counsel?

Second, the public is currently unaware of these matters. If they were aware, would they support you, or be outraged? The only way to answer that question is to put the matter before them.

Third, no law states that an attorney's self-representation is the practice of law, or that an attorney has the legal right to act as her own legal counsel. As so many attorneys and judges have allowed you to do so, might not a good portion of the public conclude that your acts constitute an arrogant conspiracy of attorneys and judges to defraud justice in an attempt to protect their own.

Fourth, this matter might best be addressed by the legislature. If the current law is indefinite, or simply being ignored, then perhaps once the members of congress become aware of this, they will respond to their constituent's demands for legislation specifically prohibiting the practice.

Ms. Mello, you have already admitted, through your own attorney's expert argument, that your acting as you own legal counsel is foolish. I doubt the good people of Missouri would have a problem with you choosing, as an individual, to act in such a manner that they may consider foolish. But I do believe that the good people of Missouri will be appalled at the thought that the State of Missouri licenses such foolery. Wouldn't that render all attorneys fools? And by deduction, all judges, and most of the members of congress? Can there be a "professional" fool? Why would an intelligent person pay for advice, an[sic]/or heed the advice, from a fool?

Though I will be pursuing this matter in court, I expect no justice. So I am about to begin a campaign to inform

the legal profession, the public, and the congress, of the current status of the laws concerning this matter. I believe they have a right to voice their informed opinion. Are you, and your level of competency, the new poster child for the legal profession? Are you the best the public can expect?

I am saddened that you insist in acting as you are. I anticipate that the public will be outraged, that ultimately your version of the law will not be upheld, and that the acts by you and your following will be condemned and punished by both the public and the profession.

If you wonder why I am doing this, consider, that I represent the ninety-nine percent of the population that are not attorneys, and we both need and deserve better, from the profession, and the courts. I believe, that once informed, we will demand it. I fail to believe that the legal profession will publicly support you and your kind. I fail to believe that the other forty-nine states will publicly support Missouri, if Missouri continues to allow you and your kind to act as you are.

Until then, let the new attorney jokes deservingly fly. For instance, what is a court jester? An attorney. What is the first state to license foolery? Missouri. Who is the first attorney to publicly admit she is a licensed fool? Susan H. Mello.

"The Mello Factor".

Sincerely,

William H. Viehweg